WES-YAS

No 230

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ELMORE L. WESTGATE,
Petitioner,

vs.

FRED G. TIMMER, Receiver of the
DIRECT REFINERY STATIONS,
BERTHA L. WESTGATE,
CLAIRE C. REYNOLDS, and
UNITED STATES OF AMERICA,
Respondents.

PETITION OF ELMORE L. WESTGATE FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

ELMORE L. WESTGATE,
Petitioner.
Business Address:
Box No. PMB 1350,
Terre Haute, Indiana.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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STATUTES CITED

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(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise).

To the Honorable, the Chief Justice of the United States Supreme Court, and the Associate Justices of the Supreme Court of the United States.

Your Petitioner Elmore L. Westgate respectfully prays that this Honorable Court grant his petition for a writ of certiorari to review the judgment of the Supreme Court of Michigan entered in the above entitled cause on June 25, 1943 (1722), affirming a judgment of the Kent Circuit Court of Michigan.

OPINION BELOW

The opinion of the court below is reported in 9 N. W. 2d 661.

JURISDICTION

The jurisdiction of this court is invoked under U.S.C. Title 28, Section 344 (b)., and U. S. Supreme Court Rule No. 38, Section 5 (a).

QUESTIONS PRESENTED

1. Where a wife by a decree of divorce is awarded one-half of the moneys, properties, income and profits in the business of petitioner described as Direct Refinery Stations, is the entire income after such award from such business taxable to petitioner for income tax purposes under the Revenue Act, and are the entire social security taxes or employment taxes as a result of the operation of such business taxable to petitioner and the wife absolved from taxation on her one-half ownership in the business.

2. Where a wife causes a receiver to be appointed over the business and properties of the Direct Refinery Stations, and the United States of America was granted a decree for income and social security taxes in the sum of $142,926.37, with interest to be added thereto, as a result of the operation of such business, is the wife entitled to take one half of the profits and assets out of the receivership prior to payment of the taxes due to the United States of America.

3. Where attorney fees are awarded to the wife, and a decree for a sum of money was also awarded to another party, is payment of such sums of money out of the receivership assets prior to payment of taxes due to the United States of America proper.

4. Was the constitutional rights of petitioner under the 4th, 5th, and 14th Amendment to the United States Constitution violated.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was engaged in the gasoline and oil business. On August 10, 1937, Bertha L. Westgate, above named respondent, commenced divorce proceedings against petitioner, and on November 30, 1938, a decree of divorce was rendered, and Bertha L. Westgate awarded one-half of petitioner's interest in and to all of the properties, moneys, bank accounts and assets of the Direct Refinery Stations as of August 10, 1937, and subsequent thereto (R. 24). After such award made to Bertha L. Westgate, on January 7, 1939, she filed a petition (R. 28), for the appointment of a receiver over the assets and business of the Direct Refinery Stations, and on February 3, 1939, a receiver was appointed (R. 66). Various other parties claimed rights and ownership to assets taken over by the receiver and it was not until January 18, 1941, that it was decreed that such other parties did not own or have any rights in the Direct Refinery Stations (R. 1581, 1582).

The United States of America filed a claim in the receivership matter for income taxes due it amounting to $133,151.94, for the years 1936, 1937, 1938, as a result of the operation of the business described as Direct Refinery Stations, and the assessment for this tax was made April 1939 (R. 569), and after the appointment of the receiver. And the United States of America also filed a claim in the receivership matter for employment or social security taxes due it as a result of the operation of the business, in the sum of $9,774.43, and this tax was assessed March 1939 and January 1940 (R. 566-567), and this assessment was made after the appointment of the receiver, the total claim of the United States of America for taxes due it and allowed by the court amounting to $142,926.37 (R. 1588-1589).

On January 18, 1941, the Kent Circuit Court of Michigan rendered a decree that various other parties who claimed ownership to the properties of the Direct Refinery Stations had no such ownership, and that the Direct Refinery Stations belonged to your petitioner Elmore L. Westgate, and that one-half of such assets shall be paid by the receiver to respondent Bertha L. West-

gate, and the other one-half made subject to the claim of the United States of America (R. 1583-1584).

The court also ordered the receiver to pay respondent Claire C. Reynolds out of the receivership assets the sum of $524.84, although no claim was made by Claire C. Reynolds, and this sum was ordered to be paid prior to payment of the United States of America (R. 1591). And an attorney fee in the sum of $2,500 was ordered to be paid to the attorney for respondent Bertha L. Westgate prior to payment of the claim of the United States of America (R. 1590).

Various books and records were seized by the receiver and others from petitioner without a search warrant and turned over to agents of the United States of America, who examined such books and secured evidence from them and such evidence was used by the United States as a basis for its claim for taxes due it and which was allowed by the court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) Respondent Bertha L. Westgate was made a tenant in common in the business and properties of petitioner Elmore L. Westgate, described as Direct Refinery Stations, as of August 10, 1937, and subsequent thereto, by a decree of the Kent Circuit Court of Michigan, and which decree was affirmed by the Supreme Court of Michigan, and by such decree respondent Bertha L. Westgate was given one-half of the income and profits and assets of such business, therefore Elmore L. Westgate, your petitioner, is not liable under the United States Revenue Act for income and social security taxes as a result of the operation of such business during such period of time on the entire income of such business and for the entire social security tax on the employees, and that respondent Bertha L. Westgate is equally liable for such taxes, and the decision of the court below, and affirmed by the Supreme Court of Michigan, making petitioner Elmore L. Westgate liable for the entire amount of such taxes while

respondent Bertha L. Westgate is absolved from taxation on her one-half interest in the business, is not in accord with the applicable decisions of this court.

(2) If petitioner Elmore L. Westgate is liable for the entire income tax and social security tax, then such tax due to the United States for which a judgment was rendered it in the amount of $142,926.37 (R. 1588-1589), should first be paid by the receiver Fred G. Timmer out of the receivership assets in compliance with the U. S. Revised Statutes, Section 3466, U. S. C. Title 31, Section 191, and that the court below was in error in allowing respondent Bertha L. Westgate to be paid one-half of the receivership assets and profits before payment of any tax due to the United States of America, and that the right of petitioner to have said tax so paid out of the receivership assets was denied to him, and it was error to to do.

(3) The court erred in granting to respondent Claire C. Reynolds a money decree in the sum of $524.84, and in authorizing payment to him out of the receivership assets before payment of the tax due to the United States, and the court erred in awarding an attorney fee to the attorney for respondent Bertha L. Westgate in the sum of $2,500, and authorizing payment out of the receivership assets before payment of the tax due to the United States of America.

(4) Petitioner's constitutional rights under the 4th, 5th, and 14th Amendment to the United States Constitution were violated, and the judgment rendered in favor of the United States in the sum of $142,926.37, was not proper.

PRAYER FOR THE WRIT

Elmore L. Westgate, your petitioner herein, respectfully prays that a writ of certiorari issue to the Supreme Court of Michigan, to the end that the record of this cause be brought to this court, that this cause may be reviewed and determined by this court and that your petitioner may have such other and further relief as the

nature of this case may justify. In support of this, his petition, he tenders a supporting brief hereto annexed.

Respectfully submitted,

(Signed) Elmore L. Westgate,
Petitioner.
Box No. PMB 1350,
Terre Haute, Indiana.

SUMMARY OF ARGUMENT

(1) Bertha L. Westgate was awarded a one-half ownership in the business and profits of the Direct Refinery Stations by a decree and by such award so made petitioner was given a full discharge of his obligation to support Bertha L. Westgate, and the income from such business and property awarded to Bertha L. Westgate was taxable to Bertha L. Westgate and not to petitioner.

(2) Bertha L. Westgate was given no preferred right or claim to one-half of the assets of the Direct Refinery Stations, and before she is entitled to take one-half of the profits and assets out of the receivership the claim of the United States of America for taxes must first be paid in accordance with the statute.

(3) The award made to Claire C. Reynolds, and the attorney for Bertha L. Westgate should not be paid out of the receivership assets prior to payment of the claim of the United States of America for taxes and under the statute the claim of the United States of America must first be paid.

(4) Books and records were seized by the receiver and others without a search warrant and turned over to the U. S. Agents, and they gathered evidence from such books and records and used it as a basis for the claim of the United States for which a judgment was rendered in its favor, and that the attitude or conduct of the U. S. Agents and the manner in which the trial was conducted amounted to a ratification of the wrongful search and seizure by the United States of America and a judgment

based thereon was in violation of petitioner's constitutional rights.

SUPPORTING BRIEF

ARGUMENT

May it please the Court:

(1)

No lien of any kind was granted to respondent Bertha L. Westgate on the assets in receivership. By the decree rendered, respondent Bertha L. Westgate was made a tenant in common with petitioner in the business of the Direct Refinery Stations (R. 22-25, 26-27). *Westgate v. Westgate*, 291 Mich. 18, 25-26. The fact that respondent Bertha L. Westgate was awarded one-half of the profits and assets of the business of the Direct Refinery Stations does not give her any preferred right or claim to have one-half of the assets and profits paid to her before payment of the tax due to the United States of America. In her petition filed (R. 28-37), and upon which petition she caused a receiver to be appointed over the Direct Refinery Stations (R. 66), she makes no claim of any kind by any pleading or even by proper objection on the trial, that she has a lien or preferred claim or right on the assets in receivership and that her claim must first be paid before payment of any tax due to the United States of America. The fact that the decree made designated the award as alimony (R. 24), this did not give to respondent Bertha L. Westgate any lien on the assets in receivership. In order for the award made (R. 24), to be a lien on the property awarded to respondent Bertha L. Westgate by the decree of divorce, the court must so direct by its decree. Compiled Laws of Michigan 1929, Section 12747. And if the court by its decree did direct that the award made was to be a lien on the property and assets of the business of the Direct Refinery Stations, this of itself would not confer any priority to payment over that of taxes due to the United States of America.

In *United States v. State of Texas*, 62 S. Ct. 350, *314*

U. S. 480, decided December 22, 1941, it was held, quoting from the syllabus:

> "A claim of the United States for federal gasoline taxes was entitled to priority, under federal statute regarding priority of claims of the United States, over claim of the State of Texas for motor fuel taxes against assets of insolvent motor fuel distributor, where prior to appointment of receiver for assets of the distributor the State of Texas had made no move to assert lien provided in Texas statute, since the priority which attached to the claim of the United States on appointment of receiver could not be divested by any subsequent proceeding in connection with the state's lien".

Respondent Bertha L. Westgate made no move whatever to assert a lien on the assets in receivership and she was not entitled to priority of payment over that of taxes due to the United States of America. If respondent Bertha L. Westgate did have any lien at all on the assets in receivership it was nothing more than an inchoate lien and it did not have priority over payment of taxes due to the United States of America.

The fact that the decree rendered labeled the award to respondent Bertha L. Westgate as alimony (R. 24), this does not relieve her from payment of taxes upon her share of the business awarded to her. Under the law of Michigan, by the decree rendered, and which decree awarded to Bertha L. Westgate one-half of the assets and profits of the Direct Refinery Stations, this decree rendered gave to petitioner a full discharge from his duty to support his divorced wife Bertha L. Westgate and left no continuing obligation to support, contingent or otherwise. According to the law of Michigan, in *Kutchai v. Kutchai,* 233 Mich 569, on page 575, it is held:

> "Where a gross or lump sum in money or in property is awarded as alimony to the wife, the power of the court is at an end and there then is no power to modify it later".

The continuing obligation to support being discharged by the decree of divorce and alimony awarded, any income or profits resulting from the operation of the business of the Direct Refinery Stations awarded to Bertha L. Westgate is taxable to respondent Bertha L. Westgate, and the entire tax due subsequent to August 10, 1937, is not taxable to petitioner Elmore L. Westgate, and the judgment so rendered (R. 1583, 1584, 1588, 1589), is not in accord with applicable decisions of this court. *Helvering v. Fuller*, 310 U. S. 69, 60 S. Ct. 784. *Pearce v. Commissioner of Internal Revenue*, 315 U. S. 543, 62 S. Ct. 754.

In *Helvering v. Fuller*, supra, the court said:

> "If respondent had not placed the shares of stock in trust but had transferred them outright to his wife as part of the property settlement, there seems to be no doubt that income subsequently accrued and paid thereon would be taxable to the wife, and not to him. Under the present statutory scheme that case would be no different from one where any debtor, voluntary or under the compulsion of a court decree, transfers securities, a farm, an office building, or the like to his creditor in whole or partial payment of his debt. Certainly it could not be claimed that income thereafter accruing from the transferred property must be included in the debtor's income tax return".

(2)

If respondent Bertha L. Westgate is not liable under the Revenue Act for income and social security or employment taxes due to the United States of America upon her one-half ownership of the business and profits resulting from the operation of the business subsequent to August 10, 1937, for the reasons stated in (1), of this brief, then it is the duty of the receiver to pay such taxes due to the United States and for which a judgment was rendered (R. 1588-1589), out of the receivership assets prior to any payment being made to respondent Bertha L. Westgate, and this right to have the tax so paid has

been denied to petitioner. Respondent Bertha L. Westgate is the one that requested the appointment of the receiver (R. 34, 37), and her request was complied with (R. 66). It is not just and equitable for her to cause a receiver to be appointed on February 3, 1939 (R. 66), and then have the receiver operate the business for all of these years and even up to the present time, and then allow respondent Bertha L. Westgate while this income has accrued to take one-half thereof before payment of any tax due to the United States of America.

The United States of America originally filed its claim in the receivership matter on June 21, 1939 (R. 2), and then on May 1, 1940, amended its claim (R. 116). The assessment for income taxes by the United States of America was not made until April 1939 (R. 569), and this assessment was made after the appointment of the receiver, the receiver being appointed on February 3, 1939 (R. 66). The assessment for social security or employment taxes was made in March 1939, and January 1940 (R. 566, 567), and this was after the receiver was appointed. If such taxes due to the United States had been paid prior to the appointment of the receiver, the assets now under the control of the receiver would be that much less in value, and the one-half interest or ownership of respondent Bertha L. Westgate would be that much less in value, or that much less for her to receive. No opportunity whatever was given to petitioner to pay the tax claimed by the United States of America. No claim or demand was made from petitioner prior to the appointment of the receiver. Prior to the receivership petitioner did pay and meet his current obligations (R. 1187). If demand for taxes had been made prior to the appointment of the receiver the taxes due to the United States of America would have been paid. The procedure adopted and attempt made to hinder petitioner in paying the tax due to the United States of America is not just and equitable. It is also not just and equitable for respondent Bertha L. Westgate to cause a receiver to be appointed and have such receiver operate the business for more than four years, and even up to the present time, and accumulate funds and profits from the business and then take one-half of such funds and profits as

well as the assets without payment of taxes due to the United States of America. Such a method of operating a receivership amounts to unjustly enhancing the share of respondent Bertha L. Westgate in the receivership assets, and causes damage and injury to petitioner by creating a situation making it impossible for him to pay the tax due to the United States of America to the profit and advantage of Bertha L. Westgate and her attorney, and to the detriment and injury and damage to petitioner. Such a method of operating a receivership is not just and equitable.

In regard to the liability of respondent Bertha L. Westgate for taxes due to the State of Michigan, the Supreme Court of Michigan in the present case at bar did hold:

> "Under the theory of unjust enrichment it is equitable that any deficiency remaining after the State has exhausted its remedies against Westgate, the Drakes, their sureties, and the receiver, should be charged against Mrs. Westgate's interest. Otherwise Mrs. Westgate's share would be enhanced by moneys collected for, and not remitted to, the State. To this extent the decree must be modified" (R. 1720). *Westgate v. Westgate*, 9 N. W. 2d 661.

U. S. Revised Statutes, Section 3466, U. S. C. Title 31, Section 191, provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed"

In the court below, by documentary evidence received in evidence on the trial of this cause, without any objection whatever by respondent Bertha L. Westgate, or the receiver Fred G. Timmer, it was contended by petitioner, that:

> "It is the claim of the taxpayer (petitioner) herein that the income tax due to the Collector of Internal Revenue for the United States of America, for the Collection District of Michigan, as disclosed by the taxpayer's (petitioner) return herein shall first be deducted out of said income and paid out of the money in the hands of said receiver before Bertha L. Westgate is entitled to share in any funds belonging to the taxpayer (petitioner) herein and in the hands of said receiver, as said claim for the amount disclosed herein has priority over any claim of Bertha L. Westgate. Otherwise, the taxpayer (petitioner) claims the right and reserves the right to deduct such one-half title and interest awarded to said Bertha L. Westgate by virtue of said decree as a proper deduction from said income" (R. 575).

And the United States of America by its claim filed alleged:

> "That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 of Section 659 of the Bankruptcy Act, Section 3466, of the Revised Statutes or other applicable provisions of the law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claim of the United States in accordance with their priority" (R. 117-118).

Respondents Bertha L. Westgate and Fred G. Timmer, the receiver, did not deny that the taxes due to the United States of America must first be paid. They did not contest the right of petitioner to have the taxes due to the United States of America paid first. And although the

receiver by his objections filed reserved the right to respondent Bertha L. Westgate to contest the claim of priority of payment of taxes due to the United States of America (R. 122-123), respondent Bertha L. Westgate, nor the receiver himself, contested the right of taxes due to the United States of America to be first paid. And counsel for respondent Bertha L. Westgate on the trial of this cause even contended:

> "In this particular case income tax and other taxes and claims for them have been filed in this receivership against the principals in this business and against the business, as I understand it, and these individuals went down to Washington to see whether some adjustment could not be made on those taxes that had been levied, and these statements were voluntary statements made by these individuals in connection with the business for the purpose of in some way or other arriving at some adjustment with respect to the taxes and it is the position of the plaintiff (respondent Bertha L. Westgate) that statements that the principals have made under these circumstances in connection with the business they are conducting are binding upon themselves and the other principals" (R. 938).

Respondent Bertha L. Westgate made no claim that she was entitled to priority of payment out of the receivership assets and did not even join issue on this question of priority. Under the statute cited, the taxes due to the United States of America have priority and must first be paid out of the receivership assets. *United States v. Texas*, supra. The right of petitioner to have his tax due to the United States of America first paid out of the receivership assets has been denied to him, and to his injury and damage.

The amount due to the United States of America for taxes, not including interest, amounts to $142,926.37 (R. 1588-1589). As of December 31, 1939, the assets in the hands of the receiver and which assets also include the profits made by the receiver as a result of the operation of the business for the year 1939 amount to $68,000.00

(R. 1183). In addition to this sum there are other assets which are not in the hands of the receiver, but belong to the receivership, and which consist of money in the banks in the sum of $19,000.00, and station inventory of $15,000.00 (R. 1185). The assessment for taxes was not made by the United States until after the appointment of the receiver. If the assessment had been made before a receiver was appointed and an opportunity given to petitioner to pay the tax, upon payment of the tax there would have been just that much less for respondent Bertha L. Westgate to receive. If the United States of America had proceeded in the usual manner for the collection of its tax, U. S. C. Title 26, Section 272, there would have been just that much less for respondent Bertha L. Westgate to receive out of the assets now in receivership. Petitioner should not be penalized because of the delay in making a claim for the tax, and respondent Bertha L. Westgate be permitted to profit by this delay. Here we have a business built up and that is a going business and a business that met and paid its obligations up to the time of the appointment of a receiver (R. 55, 1187). It does not seem equitable and just to attempt to destroy this business in the manner attempted (R. 55-57). Petitioner Elmore L. Westgate has an equal right with that of Bertha L. Westgate in the assets of this receivership. Payment to Bertha L. Westgate of one-half of these assets without first paying the tax due to the United States of America out of the receivership assets will require sale of the properties and equipment used in this business of the Direct Refinery Stations and the purpose sought to be accomplished carried out (R. 55-57). If the tax is paid in accordance with the statute before payment to Bertha L. Westgate and her attorney a destruction and ruination of the business can be avoided, and petitioner should be accorded this right under the statute to have the tax due to the United States of America first paid before payment of assets are made to Bertha L. Westgate and thus prevent a destruction and ruination of the business. Receiverships created for conservation and preservation of assets should not be per-

mitted to ripen into a destruction and ruination of the business. This receivership was created for:

> "Conservation of said business and protection of the rights of all parties in interest" (R. 67).

For the year 1936, from the operation of this business, according to the testimony of the Government's own witness, a taxable income of $23,949.88 was earned (R. 1116); for the year 1937 the business earned a taxable income of $69,223.42 (R. 1126); and for the year 1938 the business earned a taxable income of $137,170.21 (R. 1130). It was for this taxable income earned by the business for which the claim of the United States of America was made and for which a judgment was rendered, and one-half of this business was owned by respondent Bertha L. Westgate. Although the receiver was appointed on February 3, 1939 (R. 66), and the receiver took over and began operating the business, yet for the year ending 1939, while the business has been under the operation of the receiver only the sum of $5000 was earned by the business as a result of the receiver's operation of the business (R. 1183). The charges made that an attempt is being made to ruin petitioner and his business (R. 55-57) are not imaginary or fantastic. We must assume that the testimony of the Government's witnesses are true as to the income earned by this business and for which a tax was assessed and allowed. Yet although the receiver took over the business at the peak of its earning power a very small income was earned as compared to the testimony of the Government's witnesses for income earned by the business just prior to the appointment of the receiver. Petitioner should be accorded the right to have the tax due to the United States of America first paid out of the receivership assets before Bertha L. Westgate, her attorney and Claire C. Reynolds are permitted to share in any of the assets. Such right accorded petitioner will enable him to pay the tax and prevent a ruination and destruction of the business.

(3)

No claim was made by Claire C. Reynolds yet a money decree is granted to him (R. 1591), and this is to be paid

out of the receivership assets before payment of taxes due to the United States of America. And it was even conceded by Mr. Reynolds' attorney that payment to Reynolds out of the receivership assets for money paid by Reynolds on petitioner's income tax was not proper. The record shows:

> "Mr. Miller: * * * I think the second $400.00 was paid out of Reynolds' own funds and Reynolds will have to file a claim for refund for that to get it back. I think Mr. Bryant has agreed with me that that is the proper situation.
>
> Mr. Bryant: Yes, I agree to that" (R. 1139).

And even although Reynolds was employed by the business prior to the receivership at a salary of $15 per week, yet he is immediately employed by the receiver and at a salary of $50.00 a week (R. 283). Petitioner has a right to see that his assets in receivership are not dissipated so that he is prevented from having his tax due to the United States of America paid out of the receivership assets. And the plan put in operation to put petitioner out of business (R. 55-57) should not be permitted to be carried out.

The attorney fees awarded to the attorney for respondent Bertha L. Westgate was given precedence as an expense of the receivership (R. 1590). Although proceedings were taken in the Supreme Court of Michigan, *Westgate v. Westgate*, 294 Mich. 88, resulting in the reversal of a decree authorizing payment of attorney fees to the attorney for respondent Bertha L. Westgate, yet such attorney fees decreed to be improper, and ordered to be returned back to the receivership assets, the order was not complied with and the attorney fees retained (R. 1575).

Mr. Laurence W. Smith, was the attorney appointed for the receiver, and Mr. Dunn was not the attorney appointed for the receiver. Mr. Smith, as attorney for the receiver was allowed a monthly compensation of $200.00 a month (R. 78-79), and in addition thereto a lump sum of $500.00 (R. 79), and $700.00 (R. 82). Mr. Dunn repre-

sented respondent Bertha L. Westgate, a party to the suit, and who was opposing petitioner, and by reason of his position in the case he could not properly render services in behalf of the receiver, and the payment of money to Mr. Dunn as attorney fees under the guise of an expense of the receivership and authorizing payment prior to payment of the tax due to the United States of America was not proper.

In *Vieth v. Ress*, 82 N. W. 116, 60 Neb. 52, where a receiver was appointed, and one of the attorneys for the plaintiff was appointed as attorney for the receiver, and awarded $100.00 for services rendered, the court said:

> "We think the court erred in appointing Mr. Pettis to act for the receiver, over the protests of creditors. The interests of the debtor and creditor are conflicting, and the same attorney cannot with propriety act for the receiver. * * * We think the law upon this subject is correctly stated by Beach in his work on the Law of Receivers (Alderson's Edition, 1897). At page 274 the learned author says:
>
> " 'The same reasons which suffice to render the legal advisor of one of the parties to an action inelligible to be appointed receiver operate, also, to prevent him from being allowed to act as counsel for the receiver. Besides his interest in the final result of the controversy, his duty to protect and enforce the rights of one of the parties, being his cliant, will, in most cases, if he should also act as counsel for the receiver, be likely to impose upon him conflicting and inconsistent duties, such as cannot be properly performed by one person.' ".

See also *Adams v. Woods*, 8 Cal. 306.
Old Colony Trust Co. v. Union Land & Cattle Company, 4 Fed (2) 449.

And the Supreme Court of Michigan, in *Merchant's and Manufacturers' National Bank of Detroit v. Kent Circuit Judge*, 43 Mich. on page 297, held:

> "The practice in equity does not even permit the receiver to employ a solicitor in the case as his own

counsel, lest it might disarm his vigilance in watching the receiver's proceedings".

And in speaking of the administration of justice, in *State v. Neville*, 288 N. W. on page 84, in a per curiam opinion, it is said:

> "So far as the average citizen is concerned, he is less in touch with the executive and legislative department. When he is confronted with private or public differences, he naturally turns to the court for relief. His faith in the courts must be encouraged. When the time comes that our people lose faith in the courts, our form of government is fast nearing its end. * * * That faith can only be sustained by keeping our judicial proceedings, not only free from wrong, but free from all suspicion of wrong. In other words, all our court proceedings should be like Caesar's wife, 'above suspicion' ".

The receiver appointed by the court is an arm of the court. He is presumed to be neutral. Employment by him of one of the attorneys representing one of the litigants and payment to such attorney fees out of the receivership under the guise of receivership expenses prior to payment of taxes due to the United States of America is not proper.

(4)

It is the contention of petitioner that the United States of America consolidated its action with that of respondents Bertha L. Westgate and Fred G. Timmer, the receiver, and acquiesced in the procedure adopted, and that the manner or method adopted by the United States of America in the prosecution of its claim amounted to a ratification of the wrongful search and seizure of petitioner's books and records and property by Fred G. Timmer, and others, contrary to the 4th and 5th Amendment of the United States Constitution, and that the evidence thus secured was the basis of the decree rendered in favor of the United States, and that a judgment or decree rendered upon evidence so secured constitutes a de-

nial of due process under the 14th Amendment to the United States Constitution. In substantiation of these claims petitioner will point out to the court where such rights were violated by reference to the record.

Respondent Fred G. Timmer, and others, on February 4, 1939, went to 222 Pine Street, Mt. Pleasant, Michigan, where the business of petitioner was conducted. Russell Westgate, a son of petitioner was in charge of the place and he was forcibly put out of control of the business and place. Articles were removed and among the articles was a safe and a party was hired to open up the safe and its contents were removed (R. 402). This place where the business of petitioner was being conducted was a dwelling house (R. 596, 915, 916, 920). The receiver after the seizure of these books and records cooperated with the United States Agents. The United States Agents had no difficulty in examining the books and records wrongfully seized. They spent several days in looking them over and obtaining evidence therefrom (R. 1111-1112). The United States Agents even took the books and records and had them in their possession for several days and made an audit of them (R. 609). After the books were seized and removed from petitioner's place of business entries were made in them while they were kept out of possession of petitioner. Over one hundred entries had been made in the books and they were tampered with (R. 510, 598, 607). While others freely had the use of the books and records (R. 607, 609), this privilege was denied to petitioner (R. 608, 609). These books and records seized from petitioner were used by the United States Government on the trial of this cause as a basis for their claim and were put in evidence by the United States Government (R. 591, 594, 631, 632). And the decree rendered in favor of the United States of America including fraud penalties was based upon such evidence wrongfully obtained (R. 1127-1128, 1134-1135). On the trial of this cause the United States Government acquiesced in others, not Government attorneys or agents of the Government, in participating in the trial of the United States. Mr. Dunn, Mr. Smith, and Mr. Bryant were not representatives of the United States Govern-

ment (R. 558-559). This assistance given to the United States by the attorney for respondent Bertha L. Westgate, and the attorney for the receiver, was objected to (R. 589, 599, 614, 615, 627, 742, 758, 760, 783, 784). And what proof the United States Government could not put in, aid and assistance was given by the respondent Fred G. Timmer, the receiver, over the objection of petitioner (R. 725, 728, 729, 749, 750). And the receiver made no attempt whatever to defend the claim filed (R. 1203), but on the other hand assisted the United States in provits claim (R. 750, 784, 883, 894). And the United States did not undertake to grant to petitioner a fair trial by preventing such interference by others, but on the other hand acquiesced in this interference indulged in (R. 589, 590). Under the guise of cross examination by others, leading questions were propounded that the Government could not ask on direct examination (R. 601, 614, 627, 653, 759, 760, 768, 783, 784, 795, 799, 812, 813, 818, 907, 915, 1137, 1138, 1180). And income tax returns and social security tax returns (R. 571-575, 579), that are privileged between the Government and the taxpayer, such privilege was fritted away and others allowed to inspect them and obtain information from them (R. 581, 590), by the procedure adopted and acquiesced in by the United States Government on the trial of this cause.

The wrongful seizure of the books and records of petitioner was made the basis for evidence used by the United States Government in establishing its claim for which a decree was rendered in its favor. The acts and conduct of the United States Agents, and the manner in which aid and assistance was given to the United States in establishing its claim for which a decree was rendered in its favor, amounted to a ratification by the United States Government of this wrongful seizure and search of petitioner's books and records, and was a violation of petitioner's constitutional rights under the 4th and 5th Amendment to the United States Constitution. *Gambino v. United States,* 48 S. Ct. 137, 275 U. S. 310.

A judgment based upon evidence obtained in violation of one's constitutional rights is erroneous. *Gambino v. United States,* supra.

And evidence thus obtained amounts to a denial of due process of law under the 14th Amendment to the United States Constitution. *Brown v. State of Mississippi,* 297 U. S. 278, 56 S. Ct. 461. *Chambers v. State of Florida,* 309 U. S. 227, 60 S. Ct. 472. *White v. State of Texas,* 310 U. S. 530, 60 S. Ct. 1032. *Ward v. State of Texas,* 316 U. S. 547, 62 S. Ct. 1139.

CONCLUSION

It is respectfully submitted that petitioner should not be made liable for the entire amount of income and social security taxes claimed by the United States of America and that respondent Bertha L. Westgate should be made liable for her share of such taxes by reason of her one-half ownership in the business of the Direct Refinery Stations. That in any event, the taxes due to the United States of America should first be paid out of the receivership assets before respondents Bertha L. Westgate and her attorney, and Claire C. Reynolds are permitted to take any of such assets out of the receivership. That the trial had fixing liability and the amount of the tax due to the United States of America was not proper due to the interference of others than Government Agents and Attorneys, and that evidence was introduced on such trial in violation of petitioner's constitutional rights, and that he was denied due process of law, and that the judgment rendered in favor of the United States of America should be reversed and a new trial granted to petitioner without the interference by others.

Respectfully submitted,

(Signed)

ELMORE L. WESTGATE,
Petitioner.
Box No. PMB 1350,
Terre Haute, Indiana.

No 230

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ELMORE L. WESTGATE,
Petitioner,

vs.

FRED G. TIMMER, Receiver of the Direct Refinery Stations, BERTHA L. WESTGATE, CLAIRE C. REYNOLDS and UNITED STATES OF AMERICA,
Respondents.

BRIEF OF RESPONDENT BERTHA L. WESTGATE IN OPPOSITION TO PETITION OF ELMORE L. WESTGATE FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BERTHA L. WESTGATE,
Respondent.
Business Address:
726 Madison Ave., S.E.,
Grand Rapids, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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IN THE

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FRED G. TIMMER, Receiver of the Direct Refinery Stations, BERTHA L. WESTGATE, CLAIRE C. REYNOLDS and UNITED STATES OF AMERICA,
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BRIEF OF RESPONDENT BERTHA L. WESTGATE IN OPPOSITION TO PETITION OF ELMORE L. WESTGATE FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Now comes Bertha L. Westgate and respectfully submits the following as her brief in opposition to the within petition for writ of certiorari.

SUPPLEMENTAL AND COUNTER-STATEMENT OF THE MATTER INVOLVED

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise).

On August 10, 1937, when Bertha L. Westgate commenced an action in Kent County, Michigan, for divorce from petitioner, the latter was engaged in the retail operation of a chain of gasoline stations and in accompanying

wholesale business under the name of Direct Refinery Stations. To combat the attempt of Mrs. Westgate to prove petitioner's interest in said business, immediately after August 10, 1937, he commenced to do business in the names of certain of his employes by the names of Howard K. Drake, Nellie Drake, Leroy Smith, and others. The methods which he used were characterized by the trial judge as "fraud, trickery and deceit," and in this finding the Michigan Supreme Court concurred (17-18). On November 30, 1938, the trial judge awarded to Mrs. Westgate as of August 10, 1937, one-half of the petitioner's right, title and interest in and to all of the properties, moneys, bank accounts, assets and business known as the Direct Refinery Stations and in the wholesale business connected therewith (24). The decree of the court left open the question as to what the extent of Mrs. Westgate's interest in the business was, so that further proceedings became necessary to determine that question.

On January 7, 1939, after petitioner had ignored the demand of Mrs. Westgate that he disclose his interest in said business, Mrs. Westgate filed a petition for the appointment of a receiver of the Direct Refinery Stations business and for other relief, and a receiver was appointed on February 3, 1939. In the civil proceeding thereafter, Mr. Michael Garvey, who was petitioner's attorney, represented also the petitioner's employes, Mr. Howard K. Drake, Nellie Drake, Leroy Smith and others. In their behalf he prepared pleadings which claimed for them the ownership of the business and a substantial part of its assets (91), and then in the petitioner's behalf Mr. Garvey prepared pleadings which alleged that the representations made as to ownership by his employes were true (80). However, on January 18, 1941, the court decreed that the petitioner was the sole owner of the Direct Refinery Stations business and the properties connected therewith, which had been put in the names of petitioner's employes (1476). The decree of the lower court was affirmed by opinion of the Supreme Court filed May 18, 1943, and decree of the Supreme Court made June 25, 1943.

During the time that the petitioner claimed that he did not own the Direct Refinery Stations business, — and in

particular from the time that the divorce proceeding was commenced on August 10, 1937, up to the time that control of the business was taken over by the receiver February 3, 1939, — the petitioner exercised complete control over every phase of the Direct Refinery Stations business and its audits. He permitted his wholesale license as a gasoline distributor to lapse and caused licenses to be taken out in the names of Howard K. Drake and Nellie Drake, his employes. Such real and personal properties as he needed in his business he purchased in the names of these employes. However, petitioner was the only one who had an unlimited drawing account from the business, which control he used to withdraw some $37,500.00 in cash from the business during the period from August 10, 1937, to January 7, 1939; to withdraw upwards of $28,000.00 from January 7, 1939, to February 3, 1939; and to withdraw upwards of $12,600.00 after the receiver was appointed (1486-1488). Although Mr. Westgate had a taxable income during 1936 of $23,949.88, during 1937 of $69,223.42 and during 1938 of $137,170.21 (petition, page 15), he made no returns to the Collector of Internal Revenue for 1936 and 1937, and his first complete return for 1938 was filed in December, 1939, and was false, in that he claimed his income was only $28,389.16 (1597). From the assessments made by the Collector of Internal Revenue against Mr. Westgate in 1939, for income and social security taxes, no appeal was taken and no proofs were introduced by Mr. Westgate to offset the prima facie case which the introduction into evidence of the assessment lists made.

Mrs. Westgate has had no control over the Direct Refinery Stations business, and up to the time that the receiver was appointed had no income from the Direct Refinery Stations business. Up to November 5, 1939, she received temporary alimony, and since that time, by order of the court, she has received $100.00 per month from the receiver, which payments have been charged against her share of the receivership assets as permanent alimony.

Because of the large withdrawals by Mr. Westgate from the Direct Refinery Stations business of cash subsequent to the date as of which Mrs. Westgate became the owner of one-half of his right, title and interest in the same, the

court decreed that Mr. Westgate should pay over to the receiver $50,000.00 of the cash which he had received. Up to this date Mr. Westgate has failed and refused to account in any way whatsoever for the moneys so appropriated by him.

ARGUMENT

The argument in this brief we desire to divide into two sections. The first section will consist of an excerpt from the brief filed by the United States with the Supreme Court of Michigan, which excerpt answers the contention of the petitioner that his income taxes should be chargeable against Mrs. Westgate's share of the assets as well as against his share. The second section of the argument will refer to certain specific contentions of the petitioner in his brief and will attempt to show their inaccuracy.

In response to the contention of the petitioner that the taxes levied against him should be paid partially from Mrs. Westgate's share of the assets in the hands of the receiver, we quote as follows from the brief of the United States filed with the Supreme Court of the State of Michigan, pages 64 to 69, inclusive:

> "On pages 252-256 of his brief Westgate argues that part of the income taxes, apparently referring to those of 1938, should have been assessed against Bertha L. Westgate, his divorced wife. He contends that since the divorce decree gave her an interest in his property that one-half of any income derived therefrom belonged to Mrs. Westgate and that she and not Westgate was liable for taxes on income derived from such interest. The Commissioner has taxed all of the income to Westgate because he was the one who received it. He owned all the property producing the income at the times when the income was earned with the possible exception of the month of December, 1938. The decree fixing Mrs. Westgate's rights was entered on November 30, 1938. Westgate appealed and this Court affirmed the decree on November 9, 1939.

"*Westgate v. Westgate*, 291 Mich. 18, 292 N. W. 569.

"A rehearing was denied on December 20, 1939. The decree awarded Mrs. Westgate as permanent alimony one-half interest in Westgate's properties as of August 10, 1937. The properties have never been transferred to Mrs. Westgate and Westgate has received all of the income from the properties. He makes no contention that Mrs. Westgate has ever received any part of the same. At least up to November 30, 1938, Westgate not only had a right to the income but actually received it. The wife's claim against him would be for an accounting based upon a debt and obligation due and owing her in the nature of permanent alimony. Westgate continued to collect the income and probably had the right to do so at least up to February 3, 1939, the date the receiver was appointed. At any rate he received and collected all this income under a claim of right. The evidence shows he was in business right up to the time a receiver was appointed (testimony of Donald Glauz) (595).

"Even if Westgate's contentions were correct as to the month of December, 1938, which we do not concede, he has offered no evidence from which the Court can determine how much income Mrs. Westgate was entitled to receive for the month of December, 1938. The evidence does not disclose whether there was a profit or loss in that particular month. The burden rests upon any party attacking an assessment to produce evidence from which not only it can be determined that the assessment was wrong but from which correct and proper determination can be made.

"Lightsey v. Commissioner, 63 F. 2d 254 (C.C.A. 4th);

"Mattern v. Commissioner, 61 F. 2d 663 (C.C.A.) 9th;

"Merchants' Transfer & Storage Co. v. Burnet, 49 F. 2d, 56, 58 (C.C.A. 4th).

"Since Westgate has utterly failed to offer such evidence under any view of the matter the trial court properly upheld the assessments. The undisputed facts in the case show that ever since the divorce was filed Westgate through legal maneuvering has prevented Mrs. Westgate from enjoying any of the income from this property. Since it is admitted by Westgate that Mrs. Westgate has never actually received any of this income, we will briefly consider Westgate's claim that she received it constructively. *Regulations* 94 *and* 101, *Article* 42-2, define constructive receipt of income as follows:

> " 'Income not reduced to possession. — Income is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. If a corporation contingently credits its employes with bonus stock, but the stock is not available to such employes until some future date, the mere crediting on the books of the corporation does not constitute receipt.'

"Mrs. Westgate had no right to draw this income or any part thereof until the decree was affirmed, certainly not before the decree was rendered by the lower court. Westgate and not his wife earned the income. She had no part in earning the income and was not engaged in business with him in 1938. The income was never set aside to her or made available

to her so that it could be drawn upon in 1938 as contemplated by the regulations set out above.

"We do not believe it is necessary for the court to decide whether one-half of the money Westgate made from the business should be labeled alimony. If it was alimony it would not be taxable to Mrs. Westgate under the decisions of *Gould v. Gould,* 245 U. S. 151; *Douglas v. Willcuts,* 296 U. S. 1. On pages 254-256 inclusive of his brief Westgate quotes from the cases of *Helvering v. Fuller,* 310 U. S. 69, and *Pearce v. Commissioner,* 315 U. S. 543. In the Fuller case a husband and wife entered into an agreement in contemplation of divorce creating an irrevocable trust the corpus of which was certain stock. All trust income was to go to the wife and children and at the end of 10 years the corpus was to be transfered outright to the wife. An agreement was executed under which the husband was to pay the wife a weekly allowance for a period of five years. Later the divorce was granted and the trust agreement upheld by the court. The Supreme Court held the husband was taxable on the $40 a week payable under the collateral agreement. Of course the husband would have to receive this sum before paying it over to his wife. However, the corpus of the trust had been transfered to the wife and the husband thereafter owned no interest therein. Income from the corpus was therefore the wife's and not the husband's.

"If there had been an outright transfer of the properties of Westgate or any part thereof to Mrs. Westgate prior to the end of 1938, we concede that income from such properties would be taxable to Mrs. Westgate because she would have either received the income or could have received the same. The situation here is unlike that of the Fuller case. Westgate has set up no trust, made no arrangements to provide for Mrs. Westgate and has transfered no property to her as was done in the Fuller case. Instead of taking these steps thereby making the income available to Mrs. Westgate, as was the situa-

tion in the Fuller case, Westgate had been doing the exact opposite.

"In the Pearce case a husband purchased an annuity contract for his wife's benefit and the question was whether the husband was liable on income received under the contract. As was the situation in the Fuller case, the income producing property had been transfered to the wife and the case is different from the case at bar for that reason.

"In *North American Oil v. Burnet*, 286 U. S. 417, profit from certain property in dispute were collected by a corporation in 1916, and were taxed to it in that year. In 1922, after considerable litigation the court held that the profits were erroneously received and the corporation was forced to pay over such profits to the original owner. The Supreme Court held that nevertheless these profits were taxable in 1916 instead of 1922, stating (p. 424):

> "'If a taxpayer receives earnings under a claim of right and without restriction as to its disposition he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent * * *'

"In the case at bar Westgate received income through all of 1937 and 1938 under a claim of right if not through actual right. His appeal was pending at the end of 1938. His claim to receive all this income did not fall until November, 1939, when this Court affirmed the decree of the lower Court."

In particular, with respect to the contentions of the petitioner in his argument in his brief as those contentions relate to Mrs. Westgate, we call attention, first, to the statement on page 7 of that brief that no lien of any kind was granted to respondent, Bertha L. Westgate, on the assets of the receivership. Mrs. Westgate has not at any time contended that she had merely a lien upon Mr. Westgate's assets. The decree of November 30, 1938,

made her the owner of one-half of his interest in the business and dated that ownership back to August 10, 1937. The decree of the Circuit Court for the County of Kent was affirmed by the Supreme Court of the State of Michigan on March 16, 1940. Mrs. Westgate's ownership was therefore a completed fact before any lien attached to Mr. Westgate's property by reason of the tax assessments made after the receiver was appointed. On page 8 of petitioner's brief, it is contended that Mrs. Westgate made no move whatever to assert a lien on the assets of the receivership. The statement overlooks the fact that the receivership itself was a part of the proceedings which Mrs. Westgate was using to have determined the exact extent of her ownership in the assets of the Direct Refinery Stations business.

On page 10 of his brief, petitioner makes the following claim:

> "It is not just and equitable for her to cause a receiver to be appointed on February 3, 1939 (66) and then have the receiver operate the business for all of these years, and even up to the present time, and then allow respondent Bertha L. Westgate while this income has accrued to take one-half thereof before payment of any tax due to the United States of America."

This statement is misleading because it overlooks the fact that during the entire period between August 10, 1937, and the date of the receiver's appointment on February 3, 1939, Mrs. Westgate had no control over, or income from said business. During that period the petitioner not only retained complete control thereof but also withdrew from the business as much cash as he could to prevent the receiver from acquiring it among the assets of the receivership. Roughly speaking, the amount of cash wrongfully withdrawn by Mr. Westgate from the Direct Refinery Stations business from August 10, 1937, up to and after the appointment of the receiver was about equivalent to the total income tax of the petitioner for the entire year 1937 as well as for 1938 (121). In making this statement, we assume that even petitioner could not

claim that anyone except himself was liable for the penalties assessable against him.

On the same page 10 of his brief, petitioner states:

> "No opportunity whatever was given to petitioner to pay the tax claimed by the United States of America. No claim or demand was made from petitioner prior to the appointment of the receiver. Prior to the receivership petitioner did pay and meet his current obligations (1187). If demand for taxes had been made prior to the appointment of the receiver the taxes due to the United States of America would have been paid."

The statement contains an amazing reversal of the obligation of a citizen of the United States with respect to taxes to the United States Government. We do not understand that the burden is on the United States Government to catch taxpayers in failing to make returns and then make claims against them, but rather for the taxpayer voluntarily to comply with the terms of the law. The petitioner's lack of good faith is shown by his failure to make proper returns. That such a course of conduct on his part may now result to his detriment or injury is the fault of no one but himself. Only he is responsible for the fact that during his operation of the business he so depleted its assets that there is not now enough in his share of the assets to pay the taxes properly leviable against him.

On page 11 of petitioner's brief he refers to the disposition which the Supreme Court of Michigan made of the gasoline tax owing. The situation there is slightly different. The operators of the business had collected gasoline taxes in connection with their sales of gasoline. To entitle them to handle such gasoline, bonds were required and furnished to cover the entire amount of the collections involved.

With reference to the *United States Revised Statutes*, Sec. 3466 U. S. C. Title 31, Sec. 191, this respondent contends that said section is not applicable.

On page 12 of his brief petitioner refers to a statement which he appended to his amended return for the year 1938, which he filed in December, 1939. The amended return was received as an exhibit and the statement allowed to remain attached to it. It was no part of the pleadings and no issue was raised with respect to the contention of the petitioner. Throughout the proceedings, no claim was made by the United States Government that the share of the assets belonging to Mrs. Westgate was responsible for the income tax of the petitioner. There was no issue of priority raised or tried.

On page 14 of petitioner's brief, he makes the following statement:

> "Petitioner should not be penalized because of the delay in making the claim for the tax, and the respondent Bertha L. Westgate permitted to profit by this delay."

It has been judicially determined that the failure of the petitioner to pay the tax owing was due to both negligence and fraud, and there has been no showing other than the allegation of the petitioner that Mrs. Westgate did in any way profit by his delay. At the time that he was refusing to make proper income tax and social security tax returns, he was carrying out his intention to cheat both Mrs. Westgate and the United States Government. That his efforts have resulted eventually in damage to him and his loss of control of his business cannot be charged to Mrs. Westgate.

On this same page 14 of his brief, petitioner makes the following statement:

> "It does not seem equitable and just to attempt to destroy this business in the manner attempted,"

and reference is made to pages 55 and 57 of the record. In spite of the repetition of these allegations there is not a scintilla of proof in the record to support them. Had Mr. Westgate acted in good faith during the proceedings for divorce and made proper returns to the United States Government with respect to his tax obligations, he would

not be in his present position, either personally or with respect to his business affairs.

On page 15 of his brief, petitioner refers to the taxable income which he had during the years 1936, 1937, and 1938, and he states that one-half of this business was owned by the respondent Bertha L. Westgate. He fails to call to the Court's attention that the entire income for 1936 was earned and taxable prior to the time that the divorce proceedings were commenced. For the year 1937 his business records were in such condition that it was difficult to determine what his taxable income was, and during the entire period of 1936, 1937 and 1938 respondent Bertha L. Westgate had no part in the control or management of, or income from, this business.

Further, on page 15, petitioner states:

> "Such right according to petitioner will enable him to pay the tax and prevent a ruination and destruction of the business."

With the assets in the receiver's hands valued as of approximately $68,000.00, with some further assets consisting of cash in banks amounting to perhaps $19,000.00, and a station inventory of $15,000.00 as of December, 1939, it is difficult to see how the application of the entire assets to the claim of the United States would enable the petitioner to pay his taxes and at the same time enable him to continue with his business, especially in view of the fact that the amount due to the United States of America for taxes, not including interest, amounts to $142,926.37. The only result of such an application would be to deprive Mrs. Westgate entirely of the entire properties and assets which she was given by the court as permanent alimony and to enable the petitioner to retain the cash which he wrongfully withdrew from the business and appropriated to his own uses.

With respect to ground number 3, which is argued on pages 15 to 18 of the petitioner's brief, this respondent submits that she has no interest.

The fourth point contains a contention that the action of the United States in making the proof of its claim was

consolidated with the action of the Defendant Bertha L. Westgate, and of the receiver, who was seeking to recover the assets, and that such consolidation was an adoption by the United States of an alleged wrongful search and seizure of the petitioner's books, records and property, and the wrongful use of such books and records in evidence.

The actions were not consolidated, but in order to avoid the necessity of repeating the proof as to what constituted the assets of the petitioner, the proof was arranged in an orderly fashion by the order of the Court (138).

The receiver was appointed February 3, 1939, by the order of the Court (66-68). By this order he was directed to take charge of the books and records of the business. At *that* time petitioner was claiming, and he continued to claim, until the final decree in the Michigan Court, that he did not own the business or the books or records.

No contention is made but what the appointment of the receiver was legal. If the appointment was proper the action was proper.

The record in the Supreme Court of Michigan, beginning with page 5, contains 47 alleged reasons and grounds of appeal, but in no one of these is it alleged that the seizure of the books was wrongful or that they were not properly used in evidence.

After the books were in the custody of the receiver they were open to the access of the United States and of the petitioner. His son, who had been in charge of the office, spent over a hundred hours on these books. The only time he was denied access was on his first visit when the bookkeeper did not know whether he was entitled to access or not.

The receiver testified fully as to the access afforded to the parties (610). Neither Russell Westgate nor the petitioner was sworn as a witness. Neither one of them has denied the statements of the receiver that they had full and free access. On May 24, 1940, after the testimony was taken, the Court ordered all exhibits deposited with

the receiver so that they would be accessible to all attorneys in the case for their use in preparation of briefs.

The statement that the books were tampered with is not justified by the record. The pages of the record referred to show that all that was done was to bring the business records down to the date of the closing of the old business and the institution of the receivership business.

The alleged assistance given by the attorney for the receiver to the Government is well illustrated by reference to page 750 of the record, where the receiver produced an original document when the use of a copy had been previously objected to.

As to the defense of the Government's claim, the position of the receiver was fully stated on pages 1202 and 1203 of the record.

It also appears (1198) that the petitioner's motion to dismiss the Government's claim was made under the objections to the Government's claim filed by the receiver, in which the right was reserved for the benefit of all parties claiming an interest in the estate to make such objections to the Government's claim as they saw fit.

The interests of the Government and of the receiver were to a certain extent parallel in that the Government was trying to establish certain properties as belonging to the receivership so that the income therefrom would be taxable, and the receiver was trying to establish that the same properties belonged to the receivership so that the principal of such properties would be assets of the receivership.

Finally, attention is called to the fact that on page 21 of petitioner's brief, he asks only that the judgment rendered in favor of the United States of America should be reversed and no reversal is asked as to this respondent Bertha L. Westgate. While this is a technical matter, it is submitted that the judgment could not be reversed as to the United States Government and permitted to stand as to respondent Bertha L. Westgate.

CONCLUSION

On the basis of the findings of fact by the Circuit Court for the County of Kent that the petitioner owed the income and social security taxes as alleged, together with penalties for negligence and fraud, and the ownership by Mrs. Westgate of one-half of the Direct Refinery Stations business prior to the existence of any lien in behalf of the United States Government against the assets of Mr. Westgate, it is submitted that the position of the United States was correct in filing its entire claim against Mr. Westgate and assuming that no part of the claim could be levied against the property of Mrs. Westgate.

Respectfully submitted,

BERTHA L. WESTGATE,
Respondent.

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CITATIONS

518801—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 230

ELMORE L. WESTGATE, PETITIONER

v.

FRED G. TIMMER, RECEIVER OF THE DIRECT REFINERY STATIONS, BERTHA L. WESTGATE, CLAIRE C. REYNOLDS, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Kent Circuit Court (R. 1546–1576) is unreported. The opinion of the Supreme Court of Michigan (R. 1712–1721) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of Michigan was filed June 25, 1943 (R. 1722–1723). A petition for a writ of certiorari was filed August 5, 1943. The jurisdiction of this Court is invoked

under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Under a divorce decree rendered by the trial court November 30, 1938, later affirmed by the Supreme Court of Michigan, petitioner's wife was awarded a half interest in all of his properties as of August 10, 1937. The petitioner concealed his assets and received all of the income therefrom during the years 1936, 1937, and 1938, never accounting to his wife with respect thereto. Is the petitioner taxable on all the income so received?

2. Were any of petitioner's constitutional rights violated by the examination by revenue agents of petitioner's books and records in the possession of a receiver for petitioner's properties, or by their introduction in evidence by the Government at a hearing on the merits of its tax claims?[1]

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions,

[1] The petition raises various additional issues relating directly to respondents other than the United States and they are therefore not discussed herein.

vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Internal Revenue Code:

SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.

(a) *To Determine Liability of the Taxpayer.*—The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

* * * * *

(U. S. C., Title 26, Sec. 3614)

STATEMENT

Petitioner's wife, Bertha L. Westgate, was granted a divorce by the Circuit Court of Kent County, Michigan, on November 30, 1938 (R. 22–25). The Supreme Court of Michigan affirmed the decree in November 1939. *Westgate* v. *Westgate,* 291 Mich. 18. As permanent alimony the wife was awarded one-half interest in all of petitioner's properties as of August 10, 1937, including the business known as the Direct Refinery Stations and the wholesale gasoline business operated in connection with these stations (R. 24). In the decree the trial court reserved full jurisdiction of the parties and the subject matter in order that the decree might be amended or supplemented for the purpose of disposing of the fully disclosed property and property rights of the parties in connection with the award of permanent alimony (R. 25).

Subsequent to the trial court's decision and pending appeal, petitioner's wife petitioned the trial court for an accounting, naming Nellie Drake, Howard Drake, and others as defendants, and alleged they were conspiring with petitioner in concealing his properties and asked for appointment of a receiver (R. 28–37). In February 1939, the trial court appointed a receiver for petitioner's properties, including the wholesale business and retail stations; the receiver was given all the powers of a general receiver in equity and was

directed to take possession of the disputed properties, together with the books and records relating to the business (R. 66–71). The receiver sought to secure possession of the records located in petitioner's office at Mt. Pleasant, Michigan. Petitioner's son refused to turn them over whereupon the receiver, with the assistance of deputy sheriffs, took possession of them and moved them to Grand Rapids, Michigan. (R. 402.)[2] Shortly thereafter federal revenue agents began an investigation of petitioner's income and social security tax liability. They were unable to locate either Westgate or the Drakes. (R. 1111.) Westgate's records for 1936 and 1937 being incomplete, the agents questioned various persons and examined refinery records and other data (R. 1110–1112). The records were sufficient to disclose petitioner's tax liability for 1938 (R. 1112). On the basis of the reports filed by the agents, the Commissioner of Internal

[2] As to statements appearing on page 19 of petitioner's brief concerning arbitrary action by the receiver relative to these records, the receiver testified he had never refused petitioner the right to examine these records; that petitioner had never requested this right and that petitioner's son did examine the records (R. 611). Petitioner complains that entries were made in the records after the receiver took them over. These were made by Donald Glauz, receiver's assistant, a former employee of petitioner, and consisted merely of posting entries from original records of petitioner found in his office in order to bring the books up to date (R. 598). There is no contention they are not correct. The only evidence of tampering with the books was that petitioner's son, while examining the books in the custody of the receiver on behalf of the petitioner, made some unauthorized entries (R. 593–594).

Revenue assessed income and social security taxes for 1936, 1937, and 1938 and a proof of claim was filed in receivership proceedings for these taxes in the aggregate amount of $135,123.66, plus interest (R. 116–122).[3]

It was petitioner's contention that on August 11, 1937, the date the divorce suit was filed, he relinquished his wholesale business which was thereafter owned and operated by Nellie Drake, his salaried bookkeeper, who had earned $18 a week at that time (R. 619), and Howard Drake, her husband, a real estate dealer (R. 1070), who used the profits therefrom to purchase retail gasoline stations. For the year 1938 and part of 1937 the principal question was whether the wholesale business and retail stations belonged to petitioner and whether he received the income therefrom. At the hearing the Government introduced in evidence the assessment lists and assessment certificates (R. 566–567, 569–570), the records of petitioner (R. 618, 619, 620, 621, 625, 631–633) which were produced by the receiver under a subpoena *duces tecum* and oral and documentary evidence (R. 610–611).

No objection was made by petitioner to the introduction of the records on the ground they were

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[3] These taxes were as follows, including interest and penalties for fraud and failure to file returns:

Income taxes, 1936	$4,918.27
Income taxes, 1937	30,469.97
Income taxes, 1938	90,384.29
Social security taxes, 1936, 1937, and 1938	9,335.13

wrongfully seized by the receiver (R. 632). The Government's evidence included admissions by Westgate to several persons that he was the owner of the properties and businesses at all times concerned, as well as evidence showing his activities in operating and managing the business after he claimed he had no further interest in them.[4]

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[4] Some of the testimony offered by the Government was as follows:

Richard A. Cross, salesman for Superior Oil Works, that petitioner told him in 1938 his business was a gold mine, that he was making about $500 per day and that he kept the retail stations in the names of operators to evade social security taxes (R. 846–847), also that he was operating the wholesale business in 1938 in Nellie Drake's name and Howard Drake was supervising his stations (R. 839); Alexander B. Dickie, chief underwriter for a bonding company, that in May 1938 Nellie Drake told him petitioner had transferred his properties to her because he "had difficulty with his wife and therefore wanted to avoid further difficulties" (R. 715–717); Brown L. Meece, sales manager for Globe Oil and Refining Company, that petitioner, in September 1937, instructed him to invoice Nellie Drake for gasoline, stating it was necessary to handle it that way in order to protect his interests in the divorce suit (R. 655–657); Arthur Meyers, a salesman, that petitioner stated in August 1938 he was operating the wholesale business in Nellie Drake's name, that petitioner was the legal owner of all the properties, that he merely paid Nellie Drake a salary and that she and Howard Drake had no interest in the business (R. 695–696); Bertha L. Westgate, the divorced wife, that petitioner told her right after the divorce suit was filed in 1937 he was making about $6,000 per month (R. 932); William P. Gibson, formerly petitioner's bookkeeper, that in 1938 petitioner spent much of his time at the office where the business was carried on and slept there, that the Drakes received salaries, that petitioner received no salary, but had an unlimited drawing account and gave all the orders around the office (R. 618–619).

Westgate did not testify and offered no evidence, although at an informal hearing before the Bureau of Internal Revenue he offered explanations (R. 941–1102) which the trial court characterized as "contradictory, inconclusive, and unbelievable" (R. 1551). The trial court found that the wholesale and retail businesses belonged to Westgate (R. 1555, 1556, 1577, 1579–1585), and it allowed the Government's claims in the aggregate amount of $142,926.37 plus interest (R. 1588–1589). The Supreme Court of Michigan affirmed (R. 1712–1723).

ARGUMENT

I

The income from the retail and wholesale businesses was properly taxed to petitioner for the years 1936, 1937, and 1938. Mrs. Westgate had not received any of that income, and it had not been determined that she was entitled to receive any profits from the businesses, as alimony or otherwise, prior to November 30, 1938. The decree awarding her a half interest in the businesses was not rendered until November 30, 1938, and it was not affirmed until about one year later. The receiver was not put in charge of the properties until early in 1939. The petitioner received all the income from the properties during the years 1936, 1937, and 1938 and since it was then subject to his unfettered command, he was bound un-

der settled principles to report it in the years he received it, even though he might in a later year be compelled to account to his wife for one-half of the amount received. *North American Oil* v. *Burnet,* 286 U. S. 417; *Brown* v. *Helvering,* 291 U. S. 193.[5]

This case is distinguishable from *Helvering* v. *Fuller,* 310 U. S. 69 and *Pearce* v. *Commissioner,* 315 U. S. 543. In those cases it was held that where a husband has created a trust of income-producing property for the benefit of his wife, and he has been discharged of his obligation to support her, the income arising from the property after the discharge is taxable to her rather than to the husband. In the case at bar petitioner had not turned over the income-producing properties to his wife pursuant to the court's decree, the decree itself was not rendered until November 1938, and was not affirmed until 1939, and the income here involved was neither received by her nor available to her during the taxable years. The Commissioner therefore correctly taxed all of such income to the petitioner. Even if, contrary to our view, the income for the month of December 1938 should properly be taxed to her, the petitioner has failed to meet the burden of showing

[5] Similar principles should govern with respect to the social security taxes involved herein.

the amount of income, if any, that belonged to the wife for that month.

II

There was no violation of petitioner's constitutional rights through the examination of his books and records by revenue agents or the introduction of these records in evidence by the Government. Section 3614, Internal Revenue Code, *supra,* provides that in order to determine the correctness of any return or for the purpose of making a return where none has been filed, the Commissioner of Internal Revenue may designate officers, employees, and field agents of the Bureau of Internal Revenue to examine any books, records, or memoranda bearing on the tax liability of the taxpayer. Here the taxpayer's records were in the custody of the receiver pursuant to an order of the court and the examination was made by the federal agents pursuant to the statutes, with the receiver's consent and without objection by petitioner. The books were admitted in evidence after they had been produced by the receiver pursuant to subpoena and were not objected to on the grounds now urged. And there is no reason to assume that the compulsory production of private papers of a taxpayer for examination of his tax liability for use in *civil* proceedings is improper. Cf.

Counselman v. *Hitchcock,* 142 U. S. 547; *Lees* v. *United States,* 150 U. S. 476.[6]

Gambino v. *United States,* 275 U. S. 310, cited by petitioner, is clearly inapplicable, for it involved an unlawful search without a warrant under the direction of federal agents and the conviction was based wholly on such evidence. Here there was no unlawful search or seizure and the agents of the Government had nothing to do with the seizure of the records or their custody.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1943.

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[6] Moreover, the assessments by the Commissioner were *prima facie* correct. *Welch* v. *Helvering,* 290 U. S. 111; *Wickwire* v. *Reinecke,* 275 U. S. 101. Petitioner offered no evidence to show the assessments were erroneous and the records introduced in evidence were merely cumulative and in support of the assessments which were not controverted by any evidence.

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